

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBBIN L. LOLOGO and VINCENT J.
 LOLOGO,

Plaintiffs,

vs.

WAL-MART STORES, INC. d/b/a WAL-MART
 SUPERCENTER STORE #1834; and
 ADVANTAGE SALES & MARKETING LLC,

Defendants.

Case No.: 2:13-cv-1493-GMN-PAL

ORDER

Pending before the Court is the Motion for Summary Judgment (ECF No. 63) filed by Defendant Advantage Sales & Marketing LLC (“ASM”). Plaintiffs Robbin L. Lologo and Vincent J. Lologo (“Plaintiffs”) filed a Response (ECF No. 64), as did Cross-Claimant Wal-Mart Stores, Inc. (“Wal-Mart”), (ECF No. 65). ASM filed a Reply to Plaintiffs’ Response (ECF No. 66) and a Reply to Wal-Mart’s Response (ECF No. 67). For the reasons discussed below, ASM’s Motion is **GRANTED in part and DENIED in part**.

I. BACKGROUND

This case arises out of a slip and fall that occurred at Wal-Mart Store #1834, a Wal-Mart Supercenter Store in Grants Pass, Oregon (the “Wal-Mart Store”). (Am. Compl. ¶ 9, ECF No. 57). On August 7, 2011, Plaintiffs were shopping in the Wal-Mart Store and, while approaching a checkout line, Ms. Lologo allegedly slipped and fell on a brownish-yellow substance that was on the floor. (*Id.*); (Pls.’ Resp. 4:4–5). A witness later identified the substance as applesauce. (Pls.’ Resp. 4:4–5); (Depo. of Kira Sidivy p. 33, ECF No. 65-4).

ASM and Wal-Mart had an “In Store Promotions Agreement” (“the Agreement”) in effect on the date of the incident. The Agreement included, among other things, an

1 indemnification clause requiring that ASM indemnify Wal-Mart:

2 against any, and all, Claim(s) arising out of or relating to any of
3 the following circumstance which arise under this Agreement: (i)
4 breach of any of its obligations, representations, warranties, or
5 covenants made under this Agreement; (ii) negligent acts or
6 omissions by ASM or its personnel, employees, agents, or
7 representatives in the course of performing under this Agreement.

8 (MSJ 5:14–24, ECF No. 63); (Agreement § 17(c), ECF No. 63-11). ASM also had an
9 obligation under the Agreement to “maintain the areas surrounding the Promotional Event in a
10 neat and clean condition.” (Agreement § 2(j)). Although the parties dispute the precise location
11 where ASM’s promotional event took place, the parties agree that ASM distributed applesauce
12 in the Wal-Mart Store on August 7th. (MSJ 11:4–6).

13 Plaintiffs filed the instant action in state court on July 12, 2013. (Ex. B to Pet. for
14 Removal, ECF No. 1). Wal-Mart removed the case to this Court on August 20, 2013. (ECF No.
15 1). Plaintiffs amended their Complaint to add ASM as a Defendant on July 22, 2014. (ECF No.
16 57). On August 1, 2014, Wal-Mart filed a Cross-Complaint containing four claims against
17 ASM. (ECF No. 59). In the instant Motion, ASM requests that the Court enter summary
18 judgment as to all claims against it. (ECF No. 63).

19 **II. LEGAL STANDARD**

20 The Federal Rules of Civil Procedure provide for summary adjudication when the
21 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
22 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
23 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
24 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
25 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if
reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict

1 in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th
2 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
3 principal purpose of summary judgment is "to isolate and dispose of factually unsupported
4 claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

5 In determining summary judgment, a court applies a burden-shifting analysis. "When
6 the party moving for summary judgment would bear the burden of proof at trial, it must come
7 forward with evidence which would entitle it to a directed verdict if the evidence went
8 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
9 the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp.*
10 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
11 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
12 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
13 essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
14 party failed to make a showing sufficient to establish an element essential to that party's case
15 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
16 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
17 the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*,
18 398 U.S. 144, 159–60 (1970).

19 If the moving party satisfies its initial burden, the burden then shifts to the opposing
20 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
21 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
22 the opposing party need not establish a material issue of fact conclusively in its favor. It is
23 sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the
24 parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
25 *Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid

summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. DISCUSSION

In considering the instant Motion, the Court will first address ASM's arguments as to Plaintiff's claims, and will then address the arguments regarding Wal-Mart's cross-claims.

A. *Plaintiffs' Claims*

ASM argues summary judgment is warranted as to Plaintiffs' (i) negligence claim, (ii) negligent hiring and supervision claim, and (iii) loss of consortium claim. The Court will analyze each claim in turn.

i. *Negligence*

"To recover under a negligence theory, [a plaintiff] must prove four elements: (1) that [the defendant] owed him a duty of care; (2) that [the defendant] breached this duty of care; (3) that the breach was the legal cause of [the plaintiff's] injury; and (4) that the complainant suffered damages." *Hammerstein v. Jean Dev. W.*, 907 P.2d 975, 977 (Nev. 1995).

Plaintiffs argue that both Wal-Mart and ASM had a duty to maintain the Wal-Mart Store "in such a manner as to provide a safe environment for their invited guests." (Am. Compl. ¶ 10, ECF No. 57). ASM argues that it had no duty under premises liability to Plaintiffs. (MSJ 15:9–13). According to Nevada law, a defendant can be held liable for negligence under the theory

1 of premises liability only when the defendant is the *owner* or *occupier* of a piece of land. *See*,
 2 *e.g.*, *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1182 (Nev. 1996). However, the
 3 only relevant question to this case is whether ASM can be held liable as an occupier, as it is
 4 undisputed that the land at issue was owned by Wal-Mart, (MSJ 15:9–13).

5 ASM argues that it was not an occupier of the land because it did not have control over
 6 the area where the events occurred. (*Id.* at 16:17–17:3). Pursuant to the Agreement, ASM
 7 argues it had a duty to maintain only the area around its promotional event and was not
 8 permitted in any other area. (*Id.* at 16:17–17:3); (Agreement § 2(j), ECF No. 63-11). ASM
 9 claims the promotional event area was roughly forty-five feet away from where the incident
 10 occurred. (MSJ at p. 10, Figure 2).

11 A negligence claim cannot arise directly from a breach of contract. *See Bernard v.*
 12 *Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev. 1987) (“A breach of contract may be said to be a
 13 material failure of performance of a duty arising under or imposed by agreement. A tort, on the
 14 other hand, is a violation of a duty imposed by law, a wrong independent of contract.”).
 15 However, though the question is not resolved under Nevada law, courts in numerous other
 16 states have held that a contract may grant a licensee sufficient control over an area to establish a
 17 duty of care. *See, e.g., Oregon-Washington R. & Nav. Co. v. Branham*, 259 F. 555, 556 (9th
 18 Cir. 1919) (“[A]s it was clear that [the defendant] was an independent contractor, it cannot
 19 avoid liability for injuries sustained to a third person, where such injuries have been inflicted
 20 because of conditions brought about by its negligent action.”); *Felix v. GMS Zallie Holdings,*
 21 *Inc.*, 827 F. Supp. 2d 430, 436 (E.D. Pa. 2011) *aff’d*, 501 F. App’x 131 (3d Cir. 2012) (holding
 22 that, under Pennsylvania law, independent contractors owe a duty of reasonable care to invitees
 23 and may be held liable in negligence for causing hazardous conditions); *Stevenson v. Saratoga*
 24 *Performing Arts Ctr., Inc.*, 981 N.Y.S.2d 877, 879 (2014) (“[A] licensee exercising control
 25 owed a duty to those on the property to maintain the premises in a reasonably safe condition

1 during the period of its use.”).

2 Here, the Agreement permitted ASM to use a portion of the Wal-Mart Store as a
3 licensee, and ASM acknowledges it had a duty under the Agreement to maintain the area
4 around its promotional event. (MSJ 16:21–22, ECF No. 63). Therefore, it is clear that ASM,
5 pursuant to the terms of the Agreement, had a duty not to create hazardous conditions in the
6 area of the promotional event that could injure Wal-Mart’s invitees.

7 However, the parties dispute *where* the promotional event took place within the Wal-
8 Mart Store. ASM argues, in accordance with report of its expert, Dustin Holmes, that the
9 promotional event was located near the customer service area, beyond the point of sale and a
10 minimum of forty feet away from where Ms. Lologo slipped and fell. (*Id.* at 16:22–23); (Report
11 of Dustin Holmes at p. 4, ECF No. 63-9). Wal-Mart argues that according to the assignment
12 review sheet produced by ASM, the promotional event occurred in “Action Alley” which is the
13 same area where Ms. Lologo slipped and fell. (Assignment Review, ECF No. 65-9); (Wal-
14 Mart’s Resp. 19:12–15). Therefore, a genuine issue of material fact exists as to where ASM’s
15 promotional event was located in the Wal-Mart Store, which underlies the question as to
16 whether ASM breached its duty to Plaintiffs. Accordingly, ASM’s motion for summary
17 judgment will be denied as to Plaintiffs’ negligence claim.

18 *ii. Negligent Hiring and Supervision Claim*

19 Plaintiffs claim that that ASM had a duty to adequately train and supervise its
20 employees, which necessarily would include training regarding proper cleaning procedures.
21 (Am. Compl. ¶ 18, ECF No. 57). Plaintiffs claim ASM breached its duty to adequately train
22 and supervise its employees by not ensuring the area surrounding the promotional event was
23 clean and free of hazards. (*Id.* at ¶ 19). ASM argues that Plaintiffs have failed to provide any
24 evidence to support this claim. (MSJ 18:17–22, ECF No. 63). Indeed, rather than providing
25 evidence to support their allegations, Plaintiffs merely put forward a generic request for more

1 time to conduct discovery. (Pls.’ Response 5:1–4, ECF No. 64).

2 Plaintiffs had nearly seven weeks after ASM filed its Answer to conduct discovery and
 3 nearly six months after ASM filed the instant Motion to file a motion to extend discovery.
 4 Notably, Plaintiffs have not filed such a motion, nor do they specify what evidence they intend
 5 to seek if given more time to conduct discovery. Because Plaintiffs have not presented any
 6 evidence demonstrating that ASM breached its duty to supervise and train its employees, and
 7 have failed to demonstrate any likelihood that they will ascertain such evidence if additional
 8 discovery is granted, no genuine issue of material fact exists. Accordingly, ASM’s Motion for
 9 Summary Judgment will be granted as to this claim.

10 *iii. Loss of Consortium Claim*

11 Mr. Lologo claims that, as a result of ASM’s negligence, he suffered a loss of “spousal
 12 society, services, and consortium.” (Am. Compl. ¶ 27). ASM claims that Mr. Lologo cannot
 13 recover for loss of consortium because it is not liable for Ms. Lologo’s injuries. (MSJ 14:19–
 14 25, ECF No. 63). Because the Court, as discussed previously, will deny ASM’s Motion for
 15 Summary Judgment as to Ms. Lologo’s negligence claim, the Court will also deny the Motion
 16 as to Mr. Lologo’s loss of consortium claim.

17 ***B. Wal-Mart’s Cross-claims***

18 ASM claims summary judgment is warranted for Wal-Mart’s (i) contractual indemnity
 19 claim, (ii) equitable indemnity claim, (iii) contribution claim, and (iv) breach of contract claim.
 20 The Court will analyze each claim in turn.

21 *i. Contractual Indemnity*

22 Wal-Mart claims that, pursuant to the Agreement, ASM “is legally obligated to defend
 23 and indemnify Walmart for any and all claims arising out of [Plaintiffs’] lawsuit.” (Cross-
 24 Compl. 11:3–4, ECF No. 59). Specifically, Wal-Mart argues that ASM has a duty to indemnify
 25 it against claims arising out of or relating to: “(i) breach of any of [ASM’s] obligations,

1 representations, warranties, or covenants made under this Agreement; (ii) negligent acts or
 2 omissions by ASM or its personnel, employees, agents, or representatives in the course of
 3 performing under this Agreement.” (Agreement § 17(c), ECF No. 63-11).

4 As discussed above, because a question of fact exists as to how far the promotional
 5 event was from the location of Ms. Lologo’s fall, a genuine dispute of material fact exists as to
 6 whether ASM breached an obligation under the Agreement or negligently caused Ms. Lologo’s
 7 injuries. Accordingly, ASM’s Motion is denied as to Wal-Mart’s contractual indemnity claim.

8 *ii. Equitable Indemnity Claim*

9 Wal-Mart additionally claims equitable indemnity against ASM in its Cross-Complaint.
 10 (Cross-Compl. 11:12–24). ASM argues that a claim for equitable indemnity cannot exist
 11 where, as here, parties have contemplated and executed a valid indemnification agreement.
 12 (MSJ 20:6–11, ECF No. 63). In its Response, Wal-Mart states that because ASM has conceded
 13 that a valid indemnification agreement exists, ASM is estopped from later disputing the validity
 14 of the indemnification clause. (Wal-Mart’s Resp. 23:11–20, ECF No. 65).

15 “When the duty to indemnify arises from contractual language, it generally is not subject
 16 to equitable considerations; rather, it is enforced in accordance with the terms of the contracting
 17 parties’ agreement.” *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 255 P.3d
 18 268, 274 (Nev. 2011); *see also F.D.I.C. v. Nevada Title Co.*, No. 2:13-CV-00606-GMN, 2014
 19 WL 4798523, at *4 (D. Nev. Sept. 25, 2014) (“The Supreme Court of Nevada has held that
 20 implied indemnity theories are not viable in the face of express indemnity agreements.”
 21 (internal quotation omitted)). Because it is undisputed that a valid indemnification agreement
 22 exists between ASM and Wal-Mart, ASM’s Motion will be granted as to the equitable
 23 indemnity claim.

24 *iii. Contribution Claim*

25 Wal-Mart claims that, in the event that it and ASM are both found liable under

1 negligence and Wal-Mart satisfies more than its share of the liability, ASM should be held
2 liable to Wal-Mart for the damages attributable to ASM's negligence. (Cross-Compl. 12:13–20,
3 ECF No. 59). ASM argues that Wal-Mart's contribution claim should also be dismissed
4 because ASM believes that it did not owe a duty to Plaintiffs. (MSJ 19:9–13, ECF No. 63).
5 However, as discussed above, depending on where the promotional event was located, ASM
6 may have breached its duty to maintain the area over which it asserted control. Accordingly,
7 ASM's Motion for Summary Judgment will be denied as to Wal-Mart's contribution claim.

8 *iv. Breach of Contract Claim*

9 Wal-Mart argues that ASM breached its contractual duties by failing to defend Wal-
10 Mart from Plaintiffs' claims. (Cross-Compl. 13:10–11, ECF No. 59). As stated above, under
11 the Agreement, ASM has a duty to defend Wal-Mart against all claims that arise out of either a
12 breach of ASM's contractual duties or ASM's negligence. (Wal-Mart's Resp. 5:14–24, ECF
13 No. 65). However, the question as to whether ASM acted negligently or breached its
14 contractual duties depends, again, on the location of the promotional event in relation to the site
15 of Ms. Lologo's fall. Therefore, as a genuine dispute of material fact exists as to where the
16 promotional event took place, ASM's Motion for Summary Judgment will be denied as to the
17 breach of contract claim.

18 **IV. CONCLUSION**

19 **IT IS HEREBY ORDERED** that Advantage Sales & Marketing's Motion for Summary
20 Judgment, (ECF No. 63), is **GRANTED in part and DENIED in part**, pursuant to the
21 foregoing.

22 **DATED** this 27th day of April, 2015.

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Gloria M. Navarro, Chief Judge
United States District Court